Supreme Court, U. S.
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No. 78-1146

In the Supreme Court of the United States

OCTOBER TERM, 1978

MELBA A. RAVEN, PETITIONER

v.

PANAMA CANAL COMPANY and
GOVERNMENT OF THE CANAL ZONE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Solicitor General
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Washington, D.C. 20530

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Petitioner, a Panamanian citizen, sought release of two documents in respondents' possession pursuant to the Freedom of Information Act, 5 U.S.C. 552, and the Privacy Act, 5 U.S.C. 552a. The district court granted summary judgment for respondents, holding that the documents are protected from disclosure by the Freedom of Information Act's exemption relating to foreign policy and national defense, and that petitioner is not an "individual" within the meaning of the Privacy Act and therefore is not entitled to access under that statute (Pet. App. 2a-3a). The court of appeals affirmed (583 F. 2d 169; Pet. App. 1a-8a).

Petitioner contends (Pet. 5-18) that the court of appeals' decision conflicts with decisions of other circuits requiring more stringent and detailed judicial review of

agency claims that documents are protected by the foreign policy and national defense exemption to the Freedom of Information Act, 5 U.S.C. 552(b)(1)(B). This contention is incorrect. The court of appeals followed the procedures approved in *Weissman* v. *CIA*, 565 F. 2d 692 (D.C. Cir. 1977); *DiViaio* v. *Kelley*, 571 F. 2d 538 (10th Cir. 1978); *Maroscia* v. *Levi*, 569 F. 2d 1000 (7th Cir. 1977); and *Bell* v. *United States*, 563 F. 2d 484 (1st Cir. 1977), the cases on which petitioner relies (Pet. 8-17).[1] In the leading case, *Weissman* v. *CIA*, *supra*, 565 F. 2d at 697, the court concluded:

> If exemption is claimed on the basis of national security the District Court must, of course, be satisfied that proper procedures have been followed, and that by its sufficient description the contested document logically falls into the category of the exemption indicated. In deciding whether to conduct an *in camera* inspection it need not go further to test the expertise of the agency, or to question its veracity when nothing appears to raise the issue of good faith.

The court of appeals applied precisely this standard in the instant case (Pet. App. 6a). As the court noted (*ibid.*), petitioner does not contend that the proper classification procedures were not followed. And the agency's affidavits show that the two documents initially were classified by a duly authorized classification officer, that the documents were properly marked pursuant to the Executive Order, and that the classification was twice reviewed and reaffirmed by the Company-Government Committee on Classified Information (see Pet. App. 2a). The court correctly found that the affidavits establish that "the documents contain information pertaining to intelligence

[1]Petitioner also cites (Pet. 10-12) *Mead Data Central, Inc.* v. *United States Department of the Air Force*, 566 F. 2d 242 (D.C. Cir. 1977), and *Ollestad* v. *Kelly*, 573 F. 2d 1109 (9th Cir. 1978). These cases are inapposite, because they do not deal with the foreign policy and national defense exemption.

sources and methods, the unauthorized release of any intelligible exerpt from which, at a minimum, could reasonably be expected to cause damage to the national security" (Pet. App. 7a). Accordingly, the court concluded that these documents fall within the claimed exemption, and that the district court did not need to conduct an *in camera* inspection.

Petitioner argues that in the cases from other circuits where the agency's claim under the foreign policy and national security exemption was upheld, the agency supported its claim by preparing a detailed index and by releasing portions of many requested documents. But the cases petitioner cites involved as many as 500,000 documents, and such cases require detailed indices for proper judicial review. See *Bell* v. *United States*, *supra*, 563 F. 2d at 486. Petitioner's request, in contrast, involves only two documents (Pet. App. 2a). The courts below, applying the proper standard, held these two documents were exempt. Aids like an index, which are useful when a request is made for a large number of documents, were simply unnecessary here.

Petitioner also contends (Pet. 19-23) that the court of appeals erred in holding that, as a Panamanian national, she is not an "individual" entitled to disclosure of information under the Privacy Act. There is no need to reach that question in the instant case. The Privacy Act expressly provides that material covered by the foreign policy and national defense exemption to the Freedom of Information Act is exempt from disclosure under the Privacy Act if the agency head promulgates regulations exempting the relevant records. 5 U.S.C. 552a(k)(1). Since the documents in question have been exempted from disclosure by regulation, 35 C.F.R. 10.14(a)(1)(i), they are not subject to Privacy Act disclosure.

In any event, there is no merit to petitioner's claim that she is entitled to invoke the Privacy Act. The Act may be invoked by an "individual," a term that is defined as "a citizen of the United States or an alien lawfully admitted for permanent residence." 5 U.S.C. 552a(a)(2). It is undisputed that petitioner, who is a Panamanian national, does not fit this definition (see Pet. 19). She nevertheless maintains (Pet. 19) that she must be permitted to invoke the Privacy Act, regardless of the clear statutory language, because a provision of a Memorandum of Understandings between the United States and Panama[2] generally affords equality of employment opportunity in United States government positions to Panamanian citizens in the Canal Zone. This argument is frivolous, because the purpose of the Privacy Act is to afford protection against invasions of personal privacy, not to create employment opportunties.

Petitioner also argues (Pet. 20-23) that the denial of Privacy Act rights to Panamanian nationals violates the Due Process Clause.[3] But nothing in the Due Process Clause of the Fifth Amendment precludes Congress from differentiating between foreign nationals residing overseas and United States citizens or aliens who are permanent lawful residents of the United States. Cf. *Mathews* v. *Diaz*, 426 U.S. 67, 78-79 (1976) ("[A] host of constitutional and statutory provisions rest on the premise that a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded to the other * * *.").

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[2]The Memorandum is reprinted at 6 U.S.T. 2273, 2330, T.I.A.S. No. 3297 at 58.

[3]Although petitioner refers to the "Equal Protection Clause," her complaint that the Privacy Act is invalid would be cognizable only under the Due Process Clause of the Fifth Amendment.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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